

FILED

02-23-2021

John Barrett

Clerk of Circuit Court

2020CV005760

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 31

MILWAUKEE COUNTY

JACIE E. MEYER,

Plaintiff,

vs.

Case No. 2020 CV 005760

AURORA HEALTH CARE,

Defendant.

MOTION HEARING

HONORABLE HANNAH C. DUGAN  
Circuit Court Judge Presiding

February 8, 2021  
(9:05 a.m.)

APPEARANCES

JESSE BLOCHER, Assistant District Attorney, and Corey Lorenz on behalf of the Plaintiff.

DANIEL E. CONLEY, Attorney at Law, Alex Shortridge, Attorney at Law, and Associate General Counsel Jane Appleby from Advocate Aurora on behalf of the Defendant.

Digitally recorded by:  
Joan M. Butz  
Official Court Reporter

## PROCEDING S

(Proceedings commenced at 9:05 a.m.)

10                   Jacie Meyer vs. Aurora Health Care 2020-CV-5760.  
11 Appearances, please.

12 MR. BLOCHER: Thank you, Your Honor. Jesse Blocher  
13 and Corey Lorenz on behalf of the plaintiff.

14 THE COURT: Okay. Good morning, Mr. Blocher and  
15 Ms. Lorenz.

16 MR. CONLEY: Your Honor, on behalf of the defendant,  
17 Dan Conley and Alex Shortridge and also appearing is Associate  
18 General Counsel Jane Appleby from Advocate Aurora.

19 THE COURT: Okay. Good morning, Mr. Conley, Ms.  
20 Shortridge, and Ms. Appleby. We also have the court clerk with  
21 us today.

22 Today we're here for a decision on a motion to dismiss  
23 that was argued -- just get the right date here -- that was  
24 properly briefed and argued on -- sorry -- on January 20th.  
25 Before the decision, does anybody have anything else they want

1 to add or state?

2 MR. BLOCHER: On behalf of the plaintiff, unless the  
3 Court has any questions, I don't.

4 THE COURT: Okay.

5 MR. CONLEY: No, Your Honor.

6 THE COURT: Okay, good. All right. Thank you. So,  
7 this is the -- a case involving a request for declaratory  
8 judgment that the fees that were charged by Aurora Health Care  
9 for electronic records were in excess and should not be -- have  
10 been charged and should be, in fact, refunded because they've  
11 been paid. I'm sorry -- yes, that's right.

12 The motion to dismiss was properly brought -- timely  
13 brought prior to an answer. The standard for their motion to  
14 dismiss is that the claim in the -- the complaint does not  
15 state an actionable cause.

16 The briefing involved the request of grant dismissal  
17 because the legislative -- the legislation -- the state  
18 legislation did not provide at all electronic -- currently does  
19 not provide for electronic record payment, but it does have a  
20 history where it did and then it didn't. The Dane County Court  
21 has issued a decision that was cited by both parties in  
22 *Banuelos*, B-A-N-U-E-L-O-S, which is currently in the Court of  
23 Appeals. And it's really only mentioned here today to draw  
24 distinction between the fact that federal law related to this  
25 issue was not addressed in that case. So there is a

1 distinction between the two cases, even though it was granted  
2 under the arguments under state law.

3 At issue is the records law, section 146.84(1)(c), that  
4 under 146.83(3f)(b)(1) that that statute isn't applicable to  
5 electronic copies for records, and these are, specifically,  
6 health records and that the -- therefore, Aurora's fees were in  
7 excess.

8 The motion to dismiss says that the statute has changed;  
9 it has -- is silent on the issue of electronic records charges.  
10 In 2009, there was a substantial amount of legislation, both  
11 statewide and federal, dealing with electronic records and  
12 providing for some costs in the state statute.

13 In 2011, the electronic records reference with respect to  
14 charges, not with respect to record production with respect to  
15 charges was repealed and, therefore, it is silent.

16 In 2009, HITECH, an acronym for federal records, H-I-T-E-  
17 C-H, all caps, Act was passed with respect to the charging of  
18 fees, unreasonable fees under federal law. There was a -- caps  
19 of \$6.50 for a request by certain -- by individuals. There  
20 were three categories of being able to -- of who requested and  
21 how much the fees would be under each person's request. This  
22 is relevant to this case, because while the fees at the federal  
23 level were provided, were allowed and were capped, a January  
24 2020 case, cited in the briefs, *Azar*, A-Z-A-R, gave a case law  
25 interpretation to HITECH allowing for the fees to be actually

1 charged under federal law in the preemption argument that has  
2 been presented, therefore is affected by that HITECH law which  
3 was not part of the decision in Banuelos. This was brought in  
4 June 2020 so that that -- as our case does apply.

5 The argument largely here is that what is being asked of  
6 the Court is to interpret the statute and to read into the  
7 state statute provisions that do not exist in the state  
8 statute. In analyzing statutes, the Court -- as is included in  
9 the briefs and the oral arguments -- has to -- looks at the  
10 standard that is in *Kalal*, K-A-L-A-L, vs. *Circuit Court Dane*  
11 *County*. It begins with -- the interpretation under *Kalal* is  
12 that the Court must begin with the language of the statute,  
13 give the statute the ordinary and common and accepted meaning,  
14 and the context in which it is used, and to look at it as a  
15 whole, so to avoid unreasonable or unexpected or absurd  
16 results, as it says in *Kalal*.

17 And also -- it also -- by doing that, such interpretation  
18 also staves off the potentiality of the Court legislating,  
19 which the Court is not to do and is not being asked to do here,  
20 but that is what the basis of that type of analysis precludes  
21 the Court entering into the legislative realm.

22 And in this case, the language of the statute is clear.  
23 It provides that there are statutory caps for fees for several  
24 categories of copies of materials -- of health records I should  
25 say: paper copies, and microfiche, and prints of x-rays. The

1 electronic copies are not included in the language of that  
2 statute 146.83(3f) (b). And therefore, the request of fees be  
3 -- there is no fee provision in that statute for electronic  
4 copies and therefore the electronic copy fee charges are  
5 outside that statute's scope.

6 The statute does provide that a healthcare provider may  
7 charge no more than the total of all the following that apply,  
8 and that is what I've already stated: paper copies, microfiche  
9 and print x-rays, and has remained silent on the question of  
10 electronic copies.

11 There is reference to electronic copies as I said earlier,  
12 about being required to provide them, and there is a  
13 recognition that electronic copies do require human effort and  
14 have responsibilities with respect to HIPAA and so forth, that  
15 under the federal legislation, retrieval, including time of the  
16 health care provider, risks, machinery, and all the rest of it  
17 do -- all the rest of the costs that are incurred in terms of  
18 getting electronic records to requesters of those electronic  
19 records. A legitimate cost that do deserve payment and the  
20 HITECH rule does require that records do be provided, that the  
21 plaintiff's argument here is basically to say that if the state  
22 law is silent on the issue that charges shouldn't be made at  
23 all.

24 Being silent on the issue means that the Court is being  
25 asked to -- because it's silent on the issue - that I step in

1 and make that determination on what is a reasonable charge, or  
2 what is a cap, or what is the appropriate cap, is asking the  
3 Court to do the legislators' work, which the Court will not do.  
4 If the legislature fails to act, that is not what the Court  
5 steps into, and the remedy here is really on the silence of the  
6 issue of payment and charges for electronic records; that  
7 belongs to the legislature to remedy.

8 The plaintiff also raises the issue -- I'm sorry, the  
9 defense also raises the issue of waiver in this, if the  
10 plaintiff has paid for the bill, and therefore, waiver should -  
11 - they should be precluded from filing this lawsuit because  
12 they've waived.

13 The Court is not going to apply -- will not apply the  
14 document of waiver in this instance, but it doesn't have to  
15 flesh that out at this time; that is an issue for another day  
16 given that the Court is granting the motion from the defense  
17 that the relief it seeks, which is to recover -- or retain the  
18 fees for the health records, is granted.

19 The Court also will find that the -- amending the  
20 complaint will unlikely cure the current deficiencies in the  
21 complaint with respect to payment of these fees and the caps  
22 and so forth, the legal arguments presented. And so the Court  
23 will decline the plaintiff's request to file an amended  
24 complaint on this issue of fee caps. I think I've covered  
25 everything that I wanted to cover.

1           I didn't state at top that the legal standard on a motion  
2 to dismiss is pursuant to 802.06(2) (a) (6) and so I'll cite that  
3 as the legal standard to follow.

4           The proper burdens have been met by each party and that  
5 the patients' rights to those copies of their medical records  
6 is intact, but also the rights of the health care providers to  
7 charge them -- charge the patients for those records is also --  
8 remains available under the law.

9           Does anybody have any other questions or --

10           MR. BLOCHER: Not from the plaintiff, Your Honor.

11           THE COURT: -- clarification, Mr. Conley?

12           MR. CONLEY: No, Your Honor. We could prepare a  
13 proposed order under the five-day rule.

14           THE COURT: That's fine. That would be great. Then  
15 no objection, right, Mr. Blocher?

16           MR. BLOCHER: No, I mean, perhaps Mr. Conley could  
17 simply send it to me first. And then we could just submit it  
18 and he can submit it and say that he has my approval.

19           MR. CONLEY: We will, Your Honor.

20           THE COURT: Okay. All right, I appreciate  
21 everybody's briefing. It was very clear in your arguments; I  
22 appreciate the efforts on behalf of your clients.

23           This is an interesting issue of legislative intent and so  
24 forth, but when you have this type of flip-flop in terms of  
25 repealing and so forth, and the Court's interpretation under --

1 as are under the federal standard, it makes for an interesting  
2 briefing schedule and I appreciate everybody's effort in doing  
3 a good job for both of your clients -- for each of your  
4 clients, excuse me. All right.

5 Anything else for today?

6 MR. BLOCHER: Not for the plaintiff, Your Honor.

7 Thank you.

8 MR. CONLEY: No, Your Honor. Thank you.

9 THE COURT: All right. Everybody stay safe.

10 (Proceedings concluded at 9:26 a.m.)

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## 1 C E R T I F I C A T I O N

2 I, JOAN M. BUTZ, do hereby certify that I have been duly  
3 sworn as Official Court Reporter, for the Milwaukee County  
4 Circuit Court, Branch 31, in the State of Wisconsin.

5 I further certify that I have carefully transcribed from  
6 and compared the foregoing pages with the original digital  
7 audio recording from said proceeding and that this transcript  
8 is true and correct to the best of my ability.

9 Dated at Milwaukee, Wisconsin this 22 February 2021.

10 (Electronically signed)

11 Joan M. Butz  
12 Official Court Reporter  
13 Milwaukee County Circuit Court  
14 Branch 31  
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